RECORD AND BRIEFS

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Nos. 16-476, 16-477

IN
THE
SUPREME COURT of the UNITED STATES

GOVERNOR CHRISTOPHER J. CHRISTIE, et al.,

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

Petitioners.

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CONGRESSMAN FRANK J. PALLONE, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus represents the Sixth District of the State of New Jersey in the U.S. House of Representatives and has served as a Member of Congress and the House Committee on Energy and Commerce for 15 full terms (29 years) and 24 years, respectively. Prior to being elected to Congress, Amicus served in the New Jersey Senate within the New Jersey Legislature for five years from 1982-88. Drawing on his experience and research, Amicus may have a few worthwhile thoughts and considerations to offer the Court as it deliberates this matter.[2]

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and no person, other than amicus or their counsel, made any monetary contribution to preparing or submitting this brief. Petitioners and Respondents have consented to the filing of amicus curiae briefs, in support of either party or of neither party.

[2] PASPA, in the form of Senate bill S. 474, was reported in the Senate on November 26, 1991. The House of Representatives took up the bill and passed it under suspension of the House rules in October 1992. The legislation was signed into law by President Bush on October 28, 1992.

Amicus is the Ranking Member of the House Committee on Energy and Commerce. House of Representatives Rule X grants jurisdiction to that Committee generally over matters pertaining to the Commerce Clause and legislation affecting or affected by interstate commerce and the Commerce Clause.[3] Of the numerous state and federal bills and legislation that Amicus has introduced, debated, and voted on is the Professional and Amateur Sports Protection Act (PASPA).

INTRODUCTION AND SUMMARY OF ARGUMENT

On November 8, 2011, slightly more than one million of New Jersey's citizens voted on a constitutional ballot question to legalize sports betting within the State. Sixty four percent of these people, including Amicus, voted to amend the Constitution of the State of New Jersey to allow our New Jersey Legislature to permit gambling at Atlantic City casinos

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[3] House Rule X, cl. 1, sec. 5(f) (2017) (House Committee on Energy and Commerce Committee jurisdiction includes "interstate and foreign commerce generally.")

as well as at current and former horse and harness racetracks.[4]

2012 Sports Wagering Law

Promising beginnings in effectuating the will of New Jersey's citizens were quickly met by opposition from the major professional sports leagues ("the sports leagues") and the National Collegiate Athletic Association ("NCAA"). Not long after the New Jersey Legislature passed the 2012 Sports Wagering Law ("2012 Law"), respondents sued petitioners in federal district court charging petitioners with violating PASPA. The 2012 Law legalized and regulated sports gambling at State casinos and racetracks for individuals twenty-one and older.

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[4] *New Jersey Sports Betting Amendment, Public Question 1* was the lone ballot question put before the New Jersey voters in the 2011 general election. Political ballot questions and referenda to legalize or socialize certain areas of private conduct, such as gambling, can be highly controversial. These areas are likely to evoke strong feelings and emotions among some constituent groups and single-issue voters. Given that intensity, positions and policies taken by politicians, political parties, and governments on these sorts of questions can affect the views of voters and sway or possibly change state and federal campaigns and election outcomes.

The sports leagues and the NCAA petitioned the district court to enjoin the State from putting the 2012 Law into effect. The district court agreed with the complainants and granted their motion, finding that such betting would irreparably harm the reputations and commercial values of the sports leagues and the NCAA.

Following an unfavorable appeal of the district court's injunctive order before a divided (2-1) Third Circuit panel ("*Christie I*"), appellants petitioned for certiorari to this Court, which denied appellants' request on June 23, 2014.

2014 Repeal Law

The New Jersey Senate and Assembly went on to pass overwhelmingly a second sports wagering law in 2014 ("2014 Repeal Law"), which the Governor signed into law on October 17, 2014.

The State of New Jersey understood that the federal policy behind PASPA strictly opposed State imprimatur or sponsorship of sports betting operations and schemes. In response to this knowledge and the lessons it took from

Christie I, the New Jersey Legislature tailored the 2014 Repeal Law to preserve the federal policy and avoid conflicting with PASPA's provisions. The 2014 Repeal Law partially repealed all State laws and regulations prohibiting sports wagering "to the extent they apply or may be construed to apply [to sports wagering]" at Atlantic City casinos and gambling houses or New Jersey running or harness horse racetracks by persons 21 years and older. The 2014 Repeal Law also repealed New Jersey laws governing civil and criminal penalties for gambling. Like the 2012 Law, the 2014 Repeal Law excluded "collegiate sports contest[s] or collegiate athletic event[s] that take [] place in New Jersey or. . .sport contest[s] or athletic event[s] in which any New Jersey college team participates."

The sports leagues challenged the 2014 Law—again, they filed a motion for a temporary restraining order and a preliminary injunction against State petitioners to prevent commencement of sports wagering at Monmouth Park. The district court granted the TRO motion in October 2014.

Petitioners appealed the district court's second injunctive order before

another Third Circuit panel ("*Christie II*"). The Christie II panel affirmed the district court on a divided 2-to-1 vote.

Petitioners applied to the Third Circuit to rehear the case *en banc*, and the appeals court granted their request. Sitting *en banc*, the Third Circuit Court of Appeals affirmed the injunctive remedy ordered by the district court by a 9-to-3 vote. That command illegally compelled the State of New Jersey to reinstate former State laws prohibiting sports wagering.

A Congressional command that penetrates state government and disables one of a legislative body's core powers is dangerous to our democracy and federalism. The Framers of our Constitution tried mightily to make clear and certain that it was neither the Federal Government's right nor its role to commandeer the States--certainly not by usurping a State's sovereignty and autonomy over state legislative and policy-making functions.

Intrusive orders from the Federal Government to the States cheapen and discredit the Federal Government's guarantee to the States under the Tenth Amendment. These commands are like

invisible wires that can tug and trip the State governments. As they stumble or from these outside pressures and maneuvers, they appear inept and misaligned with their electorates and constituents. This can lead many of a State's citizens puzzled and wondering if these leaders can capably serve their interests.

The Third Circuit's precedent was earnestly reasoned, but more direction from the Court is greatly needed. Here is an occasion for the Court to go past calling balls and strikes. To mend our Republic Amicus would ask that you ensure that the scoreboards are operable and the fields and courts of intergovernmental play are in fair and playable condition before having the State of New Jersey take up the field one final time.[5]

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[5] Pet. App. 158a ("we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.", *Christie I*) (Fuentes, J.).

ARGUMENT

I. THE 2014 REPEAL LAW DOES NOT VIOLATE PASPA

a. State Petitioners Do Not "Authorize [Sports Wagering Schemes] By Law or Compact" Under the 2014 Repeal Law

The Court could easily get to and through the Tenth Amendment question presented without revisiting the rulings below as to whether the 2014 Repeal Law is the sort of authorization that PASPA prohibits. But, the Third Circuit Court of Appeal's broad construction of PASPA's preemptive scope, compounded by its even broader definition of the phrase "authorized by law or compact" should be revisited on appeal.[6] Amicus thereby requests the Court's indulgence to offer briefly some perspectives on the

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[6] State constituents generally expressed their support for the ballot question in terms of the prospects for new state legislation to enhance state revenues and improvements or accelerate state economic development leading to sizable employment gains and revitalization of state commerce in the casino gaming, hospitality, horse racing, and tourism industries.

authorization issue, and about PASPA's true preemptive scope.[7]

PASPA lacks a definition for the key statutory phrase – "authorize by law or compact." Though PASPA contains plain language, it is not entirely unambiguous. Therefore, Amicus respectfully urges the Court to exercise care in relying purely or predominantly on a textual analysis of PASPA's language.[8]

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[7] The Constitution presumes that agreements or compacts between States cannot be formed without prior, affirmative Congressional approval. Since all powers that are not enumerated are reserved to the states, there is no listing of state powers in the Constitution; Art. I, clause 10 of the Constitution does list, however, classes of state laws and actions that states are prohibited from doing absolutely, or "[w]ithout the Consent of Congress[]" or Congressional pre-approval. U.S. Const., Art. I, cl. 10.

[8] If the Court were to base its decision in this case – unanimous or otherwise – on a textual analysis of PASPA, Amicus respectfully advances that it should opine on the statutory text and not consider exogenous matters, such as the likelihood of some domino effect occurring across other States were the Court to rule in favor of petitioner(s), or .a State official or unit having standing would sue a State defendant under Section 3703 for violating PASPA. *Cf.* Br. of Resp. in Opp. to Pet. for Cert. at 21 ("As noted

Going beyond a textual analysis to look into PASPA's legislative history reveals that a less conspicuous purpose for enacting the law could have been to incentivize (and perhaps shield) State enforcement officials (from criminal liability) to continue to enforce PASPA against other States and State officials. *See* Professional and Amateur Sports Protection Senate Report No. 102-248 (1991) ("Gambling and lotteries are *already* subject to Federal regulation and this legislation is meant to be consistent with and to clarify existing Federal law and policy...Senate bill 474 is, among other things, an effort to more effectively enforce the Federal policy embodied in title 18. Without this legislation, the Justice Department cannot enforce the law without utilizing criminal prosecutions of State officials.") (emphasis added); H.R. 74, Professional and Amateur Sports Protection Act: Hearing before House Subcommittee on

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PASPA has spawned just five cases and four appellate opinions in its more than two decades on the books—[A]nd in the 24 years since its enactment, states have expressed little or no concern about PASPA, let alone about its constitutionality.").

Economic and Commercial Law, 102nd Congress, Statement of NFL Comm'r. Paul Tagliabue 18 (1991) ("H.R. 74 is [a]n effort to more effectively enforce the federal policy embodied in these provisions of Title 18. Without the legislation, the Justice Department cannot enforce the law without utilizing criminal prosecutions of state officials.")

Including States and State officials in the definition of "governmental entity" to reduce their exposure might have been an approach for accomplishing that.[9]

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[9] There is an oddity in the statute for which the legislative intention and purpose are not altogether apparent. Seeing that a "governmental entity" can also be either a professional or amateur sports organization under their respective definitions in 28 U.S.C. §§ 3701(1),(2), a State or a political subdivision of a State could sue the State or another state subdivision for injunctive relief under 28 U.S.C. §§ 3703. This cannot easily be chalked up as a drafting error; the companion bill in the House, H.R. 74 in the 102d Congress, did not incorporate "governmental entity" into the definition of either a "professional" or an "amateur sports organization". It also did not contain a definition for 'governmental entity.' These definitions originated in the Senate version (S. 474) of the legislation, which is the bill text that Congress passed into law. Regardless of the reasons, the

The 2014 Repeal Law carefully modified and repealed State sports betting prohibitions and restrictions so as not to conflict with PASPA's negative requirements. The Repeal law permits sports wagering to occur at certain venues but stops short of affirmatively authorizing or licensing the State or some other 'governmental entity,' or a 'person' to engage in conduct prohibited by PASPA.[10] The fact that Congress did not fill-in all of the blanks to clarify or delimit "authorization" in some way, should not be taken to include State legislative actions that technically and legally speaking are not authorizations, such as the passage of repealers or repeals legislation.[11]

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manner in which PASPA's terms, "professional" and "amateur sports organizations" are defined potentially pose future litigation scenarios that could violate state sovereignty, worsen political accountability, impair political process, and intensify conflicts-of-interest and already present federal/state judiciary venue concerns.

[10] *See* 28 U.S.C. §3702.

[11] Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983) (" '[i]t would be a mistake to conclude that all "lapses" of completeness and specificity result from oversights...Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed,

In addition, PASPA's very structure in relation to how other similarly crafted bills and statutes were drafted is revealing. Focusing specifically on statutes found in Title 28 of the U.S. Code, and some other statutes passed roughly contemporaneously with PASPA,[12] there have been more than a

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to leave certain issues unresolved...What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.' ").

[12] Statutes enacted roughly contemporaneously with PASPA also use the term "authorize" to refer to an affirmative act. The following statutes were enacted in the same year as PASPA. *See, e.g.*, 12 U.S.C. § 522 (providing that "[n]o Federal Reserve bank may *authorize* the acquisition or construction of any branch building . . . without the approval of the Board.") (emphasis added); 16 U.S.C. § 4911 (providing that "[n]otwithstanding any prohibition, suspension, or quota under this chapter on the importation of a species of exotic bird, the Secretary [of the Interior] may, through the issuance of import permits, *authorize* the importation of a bird of the species if the Secretary determines that such importation is not detrimental to the survival of the species and the bird is being imported exclusively" for certain purposes) (emphasis added); 42 U.S.C. § 2991b-3(f)(2)(D)(iii) (providing that another provision "shall not be construed to *authorize* Indian tribes . . . to limit

dozen instances total in which the phrase "authorize by law" or some variation of "authorize" has been used by Congress to denote an affirmative act or action (such as licensing or the granting of special permission).[13] *See generally*

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the access of the Secretary [of Health and Human Services] to such products [produced pursuant to certain grants] for purposes of administering this section or evaluating such products . . .") (emphasis added).

[13] *See, e.g.*, 28 U.S.C § 335(a) (providing that "[t]he chief judge of the Court of International Trade is *authorized* to summon annually the judges of such court to a judicial conference, at a time and place that such chief judge designates, for the purpose of considering the business of such court and improvements in the administration of justice in such court.") (emphasis added); 28 U.S.C. § 509B(b) (providing that the Attorney General shall establish a section within the Criminal Division of the Department of Justice with responsibility for the enforcement of laws against suspected participants in serious human rights offenses, and that such section "is *authorized* to . . . take appropriate legal action against individuals suspected of participating in serious human rights offenses" and "coordinate any such legal action with the United States Attorney for the relevant jurisdiction.") (emphasis added); 28 U.S.C. § 628 (providing that "there are... *authorized* to be appropriated such sums as may be necessary to carry out the provisions of this chapter [concerning the Federal Judicial Center].") (emphasis added); 28 U.S.C. § 1345

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (holding that Office of Federal Contract Compliance Programs regulations did not constitute "authoriz[ation] by law" within the meaning of the Trade Secrets Act's prohibition on the disclosure of certain information "to any extent not authorized by law" because the relevant regulations were not promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act and because there was no nexus between the regulations and a congressional delegation of authority);

(providing that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly *authorized* to sue by Act of Congress.") (emphasis added); 28 U.S.C. § 3003(c)(7) (providing that a chapter concerning federal debt collection procedures "shall not be construed to supersede or modify the operation of . . . any Federal law *authorizing*, or any inherent authority of a court to provide, injunctive relief . . .") (emphasis added); 28 U.S.C. § 3009 (providing that "[w]henever a United States marshal is *authorized* to seize property pursuant to this chapter, the United States marshal may designate another person or Federal agency to hold for safekeeping such property seized.") (emphasis added).

EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (holding that the phrase "to the extent authorized by law" in a provision of Title VII of the Civil Rights Act of 1964 "encourag[ing]" alternative dispute resolution "[w]here appropriate and to the extent authorized by law" refers to *current* case law interpreting Title VII and the Federal Arbitration Act, rather than case law as it existed when the relevant provision was drafted); *International Society for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978) (holding that a local regulation providing that "[p]ersons authorized by law to distribute literature, or solicit contributions may do so only in public areas of Chicago airports" was void for vagueness, regardless of whether the phrase "authorized by law" was interpreted as referring to (1) persons registered to distribute literature or solicit contributions or (2) persons "who are doing what is permissible under the law in general.").

b. PASPA Does Not Expressly Preempt All State Action

It would be wrong to argue that sports wagering is not pre-emptible

conduct under the Commerce Clause. It clearly is.

But, any assertion that Congress meant for PASPA to preempt the entire field of sports wagering is erroneous and baseless. *See* Pet. App. At 78a ("This case requires the court to determine whether New Jersey's recent attempt to do indirectly what it could not do directly—bring sports wagering to New Jersey in a limited fashion—conflicts with PASPA.") (Shipp, J.). Congress clearly did not mean to do so.

Knowing that States have concurrent and historic police powers to regulate gambling, the Court must not conclude that Congress intended to foreclose States from playing a regulatory role. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (" '[i]n all pre-emption cases, [p]articular[y] in [w]hich Congress has 'legislated. . .in a field which the States have traditionally occupied,' [courts] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "). *See also CTS Corp. v.*

Waldburger, 134 S. Ct. 2175, 2188-2189 (2014) (citing *Medtronic, Inc.* quotations omitted) (Kennedy, J.); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (Douglas, J.).

Despite that in both *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997) the requirements imposed on the States were affirmative, not negative; and securing radioactive waste disposal probably ranks higher as a matter of national concern and interest than prohibiting sports betting, the subject of Federal preemption could not eclipse the coercive choice that was put to the State of New York and its electorate. *New York v. United States*, 505 U.S. 144, 176 (1992) ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all. [I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.") (citing *Gregory v. Ashcroft*, 501 U.S. 452,

460) (1991). Like States such as New York, which faced " 'the 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress" ', the State of New Jersey and its officials are being accorded no room to implement an alternative framework that does not conflict with PASPA. "*Id.* at 176

Understandably, preemption must be the theory of respondents' case for it to shape-shift an unconstitutional and illegal command under the Tenth Amendment into a permissible exercise of Federal authority under the Supremacy Clause. *See, e.g.*, Resp. Br. in Opp. to Pet. for Cert., *Christie v. Nat'l Collegiate Athletic Ass'n.*, Nos.16-476 & 16-477 (2016) (citing *Arizona v. United States*, 132 S. Ct. 2492, 2500-01) (quotation omitted); Br. of U.S. as *Amicus Curiae* at 12, *Christie v. Nat'l Collegiate Athletic Ass'n.*, Nos.16-476 & 16-477 (U.S. May 2017) ("Such regulations of the States' own activities do not violate the anti-commandeering principle because they "do[] not require the States in their sovereign capacity to regulate their own citizens" and "do [] not require state officials to assist in the

enforcement of federal statutes regulating private individuals.")

The Federal purpose that underlies PASPA, which is to prohibit unauthorized sports betting and its spread, relies greatly on state functions and employees (especially law enforcement and revenue officials) for its execution and enforcement. Without the States' cooperation, the Federal policy could not have been executed as widely (geographically speaking) or comprehensively as it has been.

The Court must see the 2014 Repeal Law for what it is and define it accordingly. Amicus knows that this is not an easy but a very important task in preserving our federalist system of government. Amicus would urge the Court as it considers whether a State repeal is or isn't an "authorization by law" under PASPA to balance its construction in a way that offsets, if not deters, Congressional and Executive intrusions upon State sovereignty that move us closer to "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished

from individuals." *New York*, 505 U.S. 144, 180 (1992).

II. PASPA VIOLATES THE ANTI-COMMANDEERING DOCTRINE

a. The Anti-Commandeering Doctrine Does Not Exclude Negative Requirements

The statutory commands made to the States in both *New York* and *Printz* were affirmative requirements and directives. J.A. at 156a ("Unlike the problematic "take title" provision and the background check requirements, PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, **to expend any funds**, or to **in any way enforce federal law**.") (Fuentes, J.) (bold emphasis added). While it is certainly easier to depict an affirmative requirement as being a command, there is no black letter rule or federal case law that categorically excludes negative

requirements from the anti-commandeering doctrine.[14]

There is no reason to think that the Framers would have seen a need for such an exclusion given the high number of federal statutes, which are drafted to include negative requirements or combinations of positive and negative requirements. And, given how few anti-commandeering challenges are prosecuted successfully, it would not be sensible to disqualify such a substantial number of legislative measures from anti-commandeering analysis or challenge.[15] Finally, an exclusionary rule like the one that respondents purport exists could tempt Congress to opt more often than not, or more than it should, to impose negative requirements on States

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[14] Coercion means to cause (a person or an object) to give in to pressure. The pressure can be applied directly to subject a specific person to that pressure, or the entity that is coercing can engage in implied or constructive coercion by applying indirect pressure. *State v. Darlington*, 153 Ind. 1, 53 N.E. 025; *Cliappell v. Trent* 00 Va. S49, 19 S.E. 314; *Radicli v. Ilutohins* 95 U.S. 213, 24 L. Ed. 409; *Peyser v. New York* 70 N.Y. 497.20 Am. Rep. G24; *State v. Boyle*, 13 R.I. 53S.

[15] *See supra* n. 8.

in legislation. Such developments would be an anathema to federalism and "prevent States from functioning as... sovereign[s]." *New York*, 505 U.S. at 177.

b. PASPA's Commands Are Unconstitutional For Compelling The States To Regulate Their Own Citizens In Their Sovereign Capacity

Congress is compelling the State of New Jersey through PASPA, as construed by the Third Circuit, to reinstate former prohibitions against sports betting that it no longer wants to maintain in effect. This same act of Congress also compels the State of New Jersey to forego the enactment of its 2014 Repeal Law—a sports wagering law that New Jersey and a majority of her citizens do in fact want to have effect in the State's legal codes.

It does not matter that PASPA is not as prescriptive as the Low Level Radiation Waste Amendments Act of 1985 or the Brady Handgun Law, or that PASPA does not contain affirmative requirements. These statutes did not

contain the same sorts of ere not maladies or infirmities contained in PASPA, whose simplicity can in some ways challenge the vision of federal courts in objectively identifying and rooting out unconstitutional commands where they exist in federal law.

Federal laws that compel States to abandon their own powers and govern instead according to Congress's instructions, regulate their own processes, or that conscript them or state officials to achieve their ends and priorities illegally commandeer the States. The anti-commandeering doctrine seeks to maintain political forms and processes in order to promote political accountability.

PASPA unlawfully commands States, such as New Jersey, which have opted to deregulate enforcement and criminalization of persons engaging in sports wagering, to sanction their citizens. *See New York*, 505 U.S. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.") While States cannot stop the Federal Government from enforcing federal law within their territory, the

Federal Government cannot command the State to create a law criminalizing the conduct. Chemerinsky, Forman, Hopper, and Kamin, *Cooperative Federalism and Marijuana Regulation* 62 UCLA L. REV. 74 (2015) (citing *Printz*, 521 U.S. at 912; *New York*, 505 U.S. at 162.)

The statutory sources of PASPA's unconstitutional commands to the States are embodied in Sections 3702 and 3703 of the Act. At its heart, PASPA directs the States and private persons acting on a State's authority not to undertake certain activities or actions establishing "lottery, sweepstakes, or other [sports] betting, gambling, or wagering scheme[s.]" 28 U.S.C. §§3702 (2), (3). The 2014 Repeal Law which is, by far, more in keeping with what the majority of New Jersey's citizens voted for and support, does not conflict with relevant Federal laws or policy. Yet, Congress has commanded the State of New Jersey to reinstate and enforce its instructions and federal policy.

Proper form matters because it promotes federalism and in turn, individual liberties and freedoms are better protected. Where the federalist

system of government is concerned, the form and predictability of process, unlike the random chances of a wagering scheme, can promote compelling goals of national importance.[16]

Providing constituents with access to more government officials on multiple levels of government augments constituents' awareness and power among political and governmental bodies.[17] It also promotes political

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[16] The Tenth Amendment and its anti-commandeering doctrine, unlike Commerce Clause preemption, is just as obsessed over the form of a law or a measure as its function or functionality. This derives from the Framers' unconditional esteem and respect for the prominence of States as dual sovereigns in the federalist system to, among other things help diffuse the power of individuals and minorities in society, and reliably inform the electorate in promoting political accountability. *See supra* n.4. *But see* Resp. Br. in Opp. to Pet. for Cert 2016 US S. Ct. Briefs Lexis 4627, 4630 ("Far from evincing any constitutional problem, PASPA's preemption of that novel law follows from a straightforward operation of the principle that the substance of a state law, not its label or form, controls the preemption analysis.")

[17] Unconstitutional commands to the States are also corrosive of checks and balances as the interests and power of individual citizens are made less diffuse and conspicuous.

accountability by easing citizens' abilities to learn and understand what the distinctive positions of political actors and entities are, and which entities are responsible for forwarding or not supporting particular initiatives, especially those that are controversial or more widely-followed.

Political accountability goes beyond enabling citizens to know in some linear way which governmental entity or actor is responsible for having passed or implemented a particular legislative measure or policy. Through greater accountability, a State's citizens can frame whether their elected officials and representatives are doing enough to merit the privilege (through the election process) of continuing to represent and serve the citizens of that State.

The Constitutional blueprint for protecting and promoting individual freedoms and liberties depends heavily on the concept of dual sovereignty and its application to federal-state relations. Congress's commands to the New Jersey Governor and State Legislature should not be able to wipe those freedoms away, or to blur and distort further the pathways of power and decision-making

with respect to sports wagering within the States.

The command of Congress, construed by the Third Circuit as its faithful agent, ordering the State of New Jersey to reinstate former and repealed sports gambling prohibitions and to enforce those rejected laws and regulations violates New Jersey's separate and distinct sovereignty under the U.S. Constitution, as a State.

CONCLUSION

The State of New Jersey made a decision regarding what its own State laws and regulations should and should no longer include on the subject of sports gambling. It was and remains a decision with which other States and citizens are free to agree or disagree.[18]

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[18] We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. As Justice Jackson recognized some decades ago, "It is not the function of the government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error." *American Communications Association v. Douds*, 339 U.S. 382, 442-43 (1950).

The State of New Jersey and its citizens are being coerced by Congress, against their will, to enact legislation governing private conduct—namely, sports wagering—over which it shares power under the Commerce Clause with the Federal Government. By ordering New Jersey to maintain prohibitions on sports gambling that its State legislature has considered and repealed before, Congress is coercing the State of New Jersey to govern according to Congress's instructions.

As this form of coercion is unconstitutional pursuant to the guarantees to the States in the form of the Tenth Amendment, this Court should hold that PASPA is unconstitutional.

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